

5 Official Opinions of the Compliance Board 86 (2006)

**EXCEPTIONS PERMITTING CLOSED SESSION –
BUSINESS LOCATION – LEASE OF GOVERNMENTAL
CONTROLLED PROPERTY TO PRIVATE ENTITY, WITHIN
THE EXCEPTION – CLOSED SESSION PROCEDURES –
WRITTEN STATEMENT – FAILURE TO PREPARE –
MINUTES – CLOSED SESSION STATEMENT – FAILURE
TO IDENTIFY ATTENDEES VIOLATED ACT**

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Kent County News

The Open Meetings Compliance Board has considered your complaint alleging that the Rock Hall Town Council violated the Open Meetings Act when it conducted a closed “executive session” on September 14, 2006. The complaint raises issues about compliance with the Act’s procedural requirements for closing the meeting and with its requirement for a later statement of information about the closed meeting. In addition, the complaint suggested that, apart from the alleged procedural violation, the topic was one that the Act does not allow to be discussed in closed session.

For the reasons explained below, we conclude that the Town Council violated the Open Meetings Act by closing its meeting on September 14, 2006, without completing a written statement as required by the Act and by failing to list the private parties in attendance in its publicly-available minutes issued after the closed session. We also conclude that, had the proper procedures been followed, the discussion concerning the sublease of property under control of the Town for a potential business operation would have been a permissibly closed meeting under the Act.

I

Complaint and Response; Supplemental Record

According to the complaint, on September 14, 2006, during the course of a public meeting, the Mayor and Council of Rock Hall voted to close the meeting for an “executive session” to discuss a proposed lease of Town property. The complaint indicated that those in attendance, in addition to the Mayor and Council and the

Town's attorney, were Meade Breese and John Swain and their spouses. While Meade and Cheryl Breese were identified on the agenda, as far as the complainant could tell, "others [in attendance] were members of the public who were simply allowed to sit in." The session lasted over an hour.

The complaint, contending that the meeting did not involve an administrative matter excluded from the Open Meetings Act,¹ noted that no written statement was completed at the time of the vote to close the meeting. When the complainant requested a copy of the written statement the following day, he was told that no form was available at that time. The Town Clerk did, however, fax to him a document that "appears to be an excerpt from draft minutes ... [which] cites no statutory exception and contains no signatures nor does it contain other information required by the Act." The complaint summarized the procedural improprieties as follows: (1) no written record of the vote to close the session; (2) failure to cite any statutory exemption under §10-508(a);² (3) no reason supplied; and (4) no listing of parties present in the closed session.

Quoting from the abstract from the draft minutes, the complaint also challenged the basis for discussion during the closed session of "the application of the town boat slip tax to government owned marinas." According to the complaint, not only was there no notice to the public of this topic of discussion in advance of the closed session (in writing or orally), but this description "is so vague that it is impossible to discern" what might have been the legal justification for the closed session discussion. The complaint went on to speculate that had the justification been §10-508(a)(7) ("to consult with counsel to obtain legal advice"), the issue was "policy-related and so general that there cannot be [a matter of] legitimate attorney-client confidentiality"

In a timely response on behalf of the Town Council, Ernest A. Crofoot, Esquire, acknowledged that no written statement was prepared in advance of the closed session. However, a copy of the minutes of the September 14 meeting was provided, documenting that a vote was taken to close the session and support was unanimous. According to the response, the reason to move into closed session was

¹ At the time of the meeting, the Open Meetings Act did not apply, with certain exceptions not applicable here, to a public body engaged in an "executive function." Effective October 1, 2006, the Legislature substituted the label "administrative function" for the former term "executive function" without altering the definition itself. Consequently, the scope of the exclusion remains the same, apart from certain disclosure requirements when a public body elects to close an open meeting for an administrative function. *See* Chapter 584, Laws of Maryland 2006. In any event, the Council does not contend that the September 14 meeting was excluded from the Act.

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5, Annotated Code of Maryland.

made public at the time of the motion: namely, “to discuss a potential lease contract,” although “[a] specific reference to an authorizing subsection of §10-508 was not included.”

The Council disputed any suggestion that the subject matter was not permissibly discussed in closed session. Rather, the discussion fell within §10-508(a)(4), to “consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State.” In this case, “[t]he business opportunity involved, as a necessary component, the potential lease of some or all of the Maryland Food Center Authority (‘MFCA’) buildings and grounds, which are now controlled by the Town under a lease with the State of Maryland.” The Council also disputed the suggestion that select members of the public were allowed to attend the closed session. “In attendance, in addition to the Town attorney and the Council and its necessary staff, were the prospective operators of the business under discussion.”

As to the discussion about the Town boat slip tax, the response noted that the MFCA property includes the rights to six boat slips, which might be included in any prospective transaction. “Comment may have been made regarding boat slip tax issues and government owned marinas generally when this point was pursued. Such commentary may be unavoidable at times when related to the topic at hand and should not be viewed as a subterfuge for avoiding the [Open Meetings Act].”

The response also noted that, after the September 14 meeting, the Town’s counsel has advised the Council on the proper procedures for closing a meeting and provided a copy of Appendix C of the *Open Meetings Act Manual*, a form that the Attorney General has recommended for use by public bodies in closing a meeting under the Act. Counsel has also scheduled training for Town staff to avoid future “technical violations.”

Following our receipt of the Council’s response, you supplemented your complaint, accusing Mr. Crofoot of “mudd[ying] the waters.” The supplemental complaint noted that the referenced vote concerned an “executive session” rather than a closure pursuant to §10-508(a). The supplemental complaint criticized reliance on §10-508(a)(4), noting that it does not extend to contract negotiations, nor does it apply to tax matters. The supplemental complaint also raised an additional issue based on the minutes included with the Council’s response. Specifically, the supplemental complaint noted that the minutes of the September 14 meeting failed to identify the prospective operators of the business and questioned whether the spouses in attendance were business principals. The supplemental complaint also questioned the adequacy of the Council’s explanation related to the boat slip tax.

On receipt of the supplemental complaint, we invited the Council to address the additional allegation raised in the supplemental complaint. In a timely response

on behalf of the Council, Mr. Crofoot took issue with several of the complainant's comments. As to the failure to identify the business principals in publicly available minutes, the Council's supplemental response noted that "we agree that they were not stated, for obvious general reasons. Section 10-508(a)(4) would afford little protection if the name of the business were not protectable in a closed session discussion ... For example, if a major company was scouting for a location ... it would afford little protection to allow the confidential discussion but then *require* the public body to disclose the identity of the company" (emphasis in original). The Council went on to explain that the complainant's familiarity with these people does not imply that disclosure of the names is required in the minutes. Finally, Mr. Crofoot indicated that, to his knowledge, the spouses were involved in the business proposal.

II

Analysis

A. Documenting Closure of a Meeting

Before a public body goes into a closed session under the Open Meetings Act, certain procedural requirements must be followed. There must be a vote in public, to establish that a majority of the members of the public body supports closing the session. §10-508(d)(1) and (2)(i). Based on the minutes provided with the response, we find that this requirement was satisfied.

More pertinent here, the presiding officer must complete a written statement of the reason for closing the meeting, including a citation to the legal authority under the Act for closure of the session *and* a listing the topics to be discussed. §10-508(d)(2)(ii). An oral discussion, even if subsequently recorded in minutes, is not sufficient. 1 *OMCB Opinions* 13, 14-15 (1992). The required citation and topic statement that must be included in the written statement are distinct, but interrelated, requirements. *See, e.g., 4 OMCB Opinions* 142, 145 (2005). As we previously explained, "[t]he apparent legislative objective is to allow those in attendance to make a rough judgment whether the topic of discussion actually fits within the exception." *Id.* Thus, the absence of either violates the Act.

As acknowledged in the Town's response, no written statement was prepared in advance of the closed session and no reference to the applicable statutory authority for closing the session was provided. Thus, in these respects, the Act was violated. It is only through the timely disclosure of the reason for a closed meeting and the relevant statutory authority in accordance with the Act's procedural requirements that the public is given an opportunity to evaluate the propriety of a public body's actions – an opportunity that the Legislature has expressly granted the

public. §10-508(d)(3).³ We appreciate counsel’s assurances that additional guidance and training in connection with the Open Meetings Act is being provided to Town officials.

B. Scope of Discussion

The Act’s requirement that the legal authority to close a meeting be identified beforehand means that closure of a meeting may never be justified by citing an exception after the fact. 3 *OMCB Opinions* 4, 6 (2000). Consequently, we would not ordinarily indulge in a hypothetical assessment about possible exceptions not properly invoked by the public body. In this case, however, the supplemental complaint and response are at odds about whether the meeting could have been closed pursuant to §10-508(a)(4), *had* the procedural requirements of the Act been followed. A brief discussion of the point, therefore, seems warranted.

Recently, we addressed the “business relocation” exception in the context of a potential transfer of county-owned land within a business park, which the county operated as part of its economic development efforts. 5 *OMCB Opinions* 72 (2006). Recognizing that all of the exceptions authorizing a closed meeting must be narrowly construed, we went on to hold that discussions with a private entity about locating within the jurisdiction and purchasing property within the park fell within a sensibly narrow construction of §10-508(a)(4). 5 *OMCB Opinions* at 74-75.

The sublease of property under the Town’s control to a potential business concern is no different. Had the Council properly documented the basis for closure, the closed meeting would have been lawful.

The Council’s explanation as to discussions concerning the boat slip tax was less specific. Assuming that the business proposal involved use of the boat slips on the property, the potential application of a tax would be factored into any business decision; thus, we cannot say that such a discussion would be inappropriate in a meeting closed under §10-508(a)(4).⁴ On the other hand, had the discussion not been tied to a specific business proposal but instead focused on the tax as a policy matter,

³ The statute reads:

If a person objects to the closing of a session, the public body shall send a copy of the written statement required under [§10-508(d)(2)] to the [Compliance] Board.

⁴ While the complaint hypothesized that the purported justification was the securing of legal advice, the Town’s response does not support this conjecture. Therefore, we need not address this issue. However, our failure to address it should not be understood as agreement with the complaint’s suggestion that a meeting could never be closed for the purpose of exploring application of a tax to leased, government-owned property.

the discussion would have exceeded the limits of the exception in §10-508(a)(4) and, hence, would have been unlawful in closed session. Based on the limited record before us, we cannot decide this point. *See* §10-502.5(f)(2).

C. Attendance

The combined complaints raise two issues relating to attendance during the closed session, one substantive, the other procedural. The complaint questioned the propriety of those in attendance who appeared to be “members of the public ... simply [being] allowed to sit in.” The Council disputed that select members of the public were invited to attend. Based on the Council’s response, we find that this allegation lacks merit. When conducting a closed meeting to discuss a possible business relocation, a public body may treat people who are associated with the business differently than members of the public generally.

The procedural aspects of this issue are more complex. The complaint noted that persons attending the closed session were not identified prior to the closing of the meeting. However, the Act does not require that a public body document in advance of the closed session the individuals expected to attend. 1 *OMCB Opinions* 47, 49 (1993). Thus, as to this aspect of the complaint, no violation occurred.

However, following a closed session, the Act does require that a public body reveal certain information in its publicly-available minutes:

If a public body meets in closed session, the minutes for its next open session shall include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the meeting;
- (iii) a citation of the authority under this subtitle for closing the session; and
- (iv) a listing of the topics of discussion, *persons present*, and each action taken during the session.

§10-509(c)(2)(iv) (emphasis supplied).⁵ The minutes submitted by the Council identified only the Council members and Town Attorney as present and made no mention of those representing the potential business entity. While the Council's response fairly stated the concern of identifying parties involved in discussions involving economic development efforts, in our view, the submitted minutes were insufficient. As we previously recognized, "under limited circumstances, the 'persons present' may be 'listed' by more general descriptions, if direct identification would be inconsistent [with] other provisions of the Act or would frustrate any of its underlying objectives." 2 *OMCB Opinions* 60, 62 (1999). However, the absence of even a generic description of parties discussing business location plans with the Town violated the Act.⁶

III

Conclusion

The Rock Hall Town Council violated the Open Meetings Act when it closed its meeting on September 14, 2006, without completing a written statement as required by the Act. A second violation was the Council's failure to include any identification of the private parties in attendance in its publicly-available minutes issued after the closed session. However, had the proper procedures been followed, the discussion concerning the sublease of property under control of the Town for a potential business operation would have been a permissibly closed meeting under the Act.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney J. McKeldin
Tyler G. Webb

⁵ While the statute requires that the information be reported in the minutes of the public body's next open session, we have approved the practice of including the required information in the publicly-available minutes of the same day, recognizing that this practice would make the required information available to the public earlier. *See, e.g., 4 OMCB Opinions* 114, 118 n. 5 (2005).

⁶ Although not addressed in the complaint, we note that the publicly-available minutes also failed to cite the applicable statutory authority under which the session was closed.